UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STEPHENS MEDIA, LLC d/b/a *HAWAII TRIBUNE-HERALD*	)	
	)	
	)	
	)	
AND	)	**CASES 37-CA-7043**
	)	**37-CA-7045**
	)	**37-CA-7046**
HAWAII NEWSPAPER GUILD, LOCAL 39117, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO	)	**37-CA-7047**
	)	**37-CA-7048**
	)	**37-CA-7084**
	)	**37-CA-7085**
	)	**37-CA-7086**
		37-CA-7087
		37-CA-7112
		37-CA-7114
		37-CA-7115
		37-CA-7186

BRIEF OF *HAWAII TRIBUNE-HERALD* TO ADDRESS ISSUES PRESENTED BY THE BOARD IN ITS MARCH 2, 2011 NOTICE AND INVITATION TO FILE BRIEFS

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I. BACKGROUND

On February 14, 2011, the Board issued a Decision and Order in the above-referenced cases found at 356 NLRB No. 63. In that Decision, the Board severed the question of whether *Hawaii Tribune-Herald* had a duty to provide Hawaii Newspaper Guild, Guild Local 39117 with a "statement provided to it by employee Koryn Nako on October 19, 2005, or any other statements that it obtained in the course of its investigation of employee Hunter Bishop's alleged misconduct." On March 2, 2011 (via fax and U.S. Mail), the Board notified the parties of its Notice and Invitation to File Briefs[1]. The Notice explained in pertinent part that:

> Board precedent establishes that the duty to furnish information "does not encompass the duty to furnish witness statements themselves." *Fleming Cos.*, 332 NLRB 1086, 1087 (2001), quoting *Anheuser-Busch, Inc.*, 237 NLRB 982, 985 (1978). Compare *Northern Indiana Public Service Co.*, 347 NLRB 210 (2006) (employer notes of investigatory interviews of employees held confidential). This case illustrates, however, that Board precedent does not clearly define the scope of the category of "witness statements." This case also illustrates that the Board's existing jurisprudence may require the parties as well as judges and the Board to perform two levels of analysis to determine whether there is a duty to provide a statement: first asking if the statement is a witness statement under *Fleming* and *Anheuser-Busch* and then, if the statement is not so classified, asking if it is nevertheless attorney work product. We have therefore, decided to sever this allegation from the case and to solicit briefs on the issues it raises.
>
> Accordingly, the parties and interested amici are invited to file briefs on the aforementioned issues.

[1] Attached as Exhibit A.

Thereafter, the NLRB placed on its website an announcement of the Invitation to the parties and interested amici to file briefs[2]. However, the NLRB's website contained an announcement of the Invitation articulating an issue not present in the invitation itself:

> Whether the Board should continue to adhere to the holding *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978), that an employer's duty to furnish information under Section 8(a)(5) of the Act does not encompass the duty to furnish witness statements.

On March 21, 2011, *Hawaii Tribune-Herald* communicated to the Board the confusion caused by its announcement and an articulated issue not actually found in the Notice and Invitation to File Briefs. *Hawaii Tribune-Herald* asked the Board to clarify the issues on which it seeks briefs and to reissue the Invitation. Additionally, *Hawaii Tribune-Herald* requested that the time limits be extended because of the confusion.[3]

On March 24, 2011, the Board, through its Executive Secretary, Lester A. Heltzer, notified *Hawaii Tribune-Herald* that the announcement on the NLRB's website "was inaccurate." The Board made clear that the operative document for the issues to be addressed remains the Notice and Invitation issued March 2, 2011, and noted that that Invitation had not been changed.[4]

[2] Attached as Exhibit B.

[3] Attached as Exhibit C.

[4] Attached as Exhibit D.

II. ARGUMENT

A. THE INSTANT CASE DID NOT LITIGATE THE QUESTION OF WHETHER THE OCTOBER 19, 2005 STATEMENT OF KORYN NAKO WAS A "WITNESS STATEMENT"

The October 19, 2005 witness statement of Koryn Nako is in evidence as General Counsel Exhibit 6. It was produced in response to the General Counsel's *subpoena duces tecum* B-430230, specifically request 13. (ALJ Ex. 6). Guild Local 39117 had obviously spoken with Shop Steward Koryn Nako, who informed Guild Local 39117 that she had given *Hawaii Tribune-Herald* a statement as part of *Hawaii Tribune-Herald's* investigation of Hunter Bishop's misconduct.[5] Upon learning that, on November 15, 2005, Guild Local 39117's Administrative Officer, Wayne Cahill specifically requested the "statement" that Ms. Nako had given on October 19, 2005. (GC Ex. 26).

The issue litigated before ALJ McCarrick was whether or not the witness statement of Koryn Nako should have been provided to Guild Local 39117 pursuant to Guild Local 39117's information request relating to its grievance filed over the suspension and discharge of Hunter Bishop in October 2005.

Counsel for the General Counsel filed an Answering Brief to the Exceptions Filed by *Hawaii Tribune-Herald*. At page 32 of General Counsel's Brief, Counsel for the General Counsel argued that *Hawaii Tribune-Herald* must provide to Guild Local 39117 any "witness statements," including the Nako witness statement. Thus, the issue is not

[5] Incredibly, at the hearing, when *Hawaii Tribune-Herald* asked Administrative Officer Wayne Cahill, "who told you that Ms. Nako was forced to sign a statement?" Mr. Cahill ***solicited the General Counsel and his counsel to object***, stating "well, somebody should object." (Tr. 835). The ALJ ordered Mr. Cahill to answer the question. Thereafter, Mr. Cahill lamely claimed that he did not recall how he learned Ms. Nako gave a statement, but at least admitted that Guild Local 39117 knew, as of November 15, 2005, that Ms. Sledge and Ms. Higaki had taken a statement from Ms. Nako. *Id*. Ms. Nako herself testified she signed it voluntarily. (Tr. 325).

whether the document was a witness statement. The issue is whether or not Guild Local 39117 was entitled to have a copy of it.

Therefore, it would be a denial of due process to *Hawaii Tribune-Herald* to at this late date – April 1, 2011, over three years following the hearing before the ALJ – to raise the issue of whether or not General Counsel Exhibit 6 is in fact a witness statement. *See Buonadonna Shoprite, LLC*, 356 NLRB No. 115 (March 18, 2011)(Board overturned ALJ decision explaining, "… the judge should not decide an issue that the judge 'alone has interjected into the hearing, especially where, as here, the parties were never advised to litigate the issue'." (internal footnote omitted)); *The New York Post*, 353 NLRB No. 30 (September 30, 2008)(Board reversed ALJ "because the judge's reliance on an unlitigated theory of violation deprived Respondent of its right to due process."); *NLRB v. IWG, Inc*., 144 F.3d 685, 687-88 (10th Cir. 1998)(Court denied enforcement of, and remanded Board order based on unarticulated theory not present in Complaint.); *Metal Processors' Union Local No. 16, AFL-CIO v. NLRB*, 337 F.2d 114, 116 (D.C. Cir. 1964)(Court denied union petition and upheld Board Decision that refused to find a violation of the Act based upon unlitigated facts.). And, as has further been explained:

> "But the simple presentation of evidence important to an alternative claim does not satisfy the requirement that any claim at variance from the complaint be 'fully and fairly litigated' in order for the Board to decide the issue without transgressing [Respondent's] due process rights." *NLRB v. Quality C.A.T.V., Inc.*, 824 F.2d 542, 547 (7th Cir. 1987)(quoting *Pepsi-Cola Bottling Co.*, 613 F.2d at 274); *see Conair Corp. v. NLRB*, 721 F.2d 1355, 1372 (D.C. Cir. 1983)("'[T]he introduction of evidence relevant to an issue already in the case may not be used to show consent to trial of a new issue absent a clear indication that the party who introduced the evidence was attempting to raise a new issue.' ")(quoting *Cioffe v. Morris*, 676 F.2d 539, 542 (11th Cir. 1982)), *cert. denied sub nom. Local 222, Int'l Ladies Garment Workers' Union, AFL-CIO v. NLRB*, 467 U.S. 1241, 104 S.Ct. 3511, 82 L.Ed.2d 819 (1984); *Montgomery Ward & Co. v. NLRB*, 385 F.2d 760, 763 (8th Cir. 1967)(" 'Evidence without a supporting

> allegation cannot serve as the basis of a determination of an unfair labor practice.' ")(quoting *Engineers & Fabricators, Inc. v. NLRB*, 376 F.2d 482, 485 (5th Cir. 1967)). This court has stated, "Failure to clearly define the issues and advise an employer charged with a violation of the law of the specific complaint he must meet and provide *689 a full hearing upon the issue presented is, of course, to deny procedural due process of law." *J.C. Penny Co. v. NLRB*, 384 F.2d 479, 483 (10th Cir. 1967).

NLRB v. IWG, 144 F.3d at 688-89 (quotations in original). The "witness statement" issue on which the Board now solicits argument was not fully and fairly litigated. The issue was never defined in any Complaint in this case. Expanding the case to include an unplead matter violates *Hawaii Tribune-Herald*'s due process rights.

Had *Hawaii Tribune-Herald* been on notice that the definition of a witness statement – as that term is used by the Board – was to be an issue at the hearing, *Hawaii Tribune-Herald* would have adduced additional evidence at the hearing. Undoubtedly, so too would have the General Counsel, who did not contest whether Nako's statement was a "witness statement" under Board precedent at any point in the Complaints or during the litigation of this case.

B. THE OCTOBER 19, 2005 STATEMENT OF KORYN NAKO IS A WITNESS STATEMENT THAT NEED NOT BE DISCLOSED TO GUILD LOCAL 39117 PURSUANT TO *ANHEUSER-BUSCH, INC.*

On October 18, 2005, Editor David Bock wanted to have a meeting with Koryn Nako to discuss with her the allowing of access to the premises, without authorization, a non-employee Union Agent. As Editor Bock and Ms. Nako walked across the newsroom to Mr. Bock's office, Hunter Bishop attempted to inject himself into the situation in a very insubordinate, disrespectful and rude manner. Hunter Bishop, at the time, was Guild Local 39117 Chairperson for the bargaining unit. This was not a situation under the *Weingarten* rule whereby Ms. Nako had made a request of Editor Bock to have a union

representative present. Mr. Bishop was suspended on October 19, 2005 for his egregious behavior directed at Editor Bock. On the very same day *Hawaii Tribune-Herald* suspended Mr. Bishop, Guild Local 39117 filed a formal grievance protesting his suspension. (GC Ex. 20). It would have been obvious to any experienced labor relations person that Guild Local 39117 would be claiming that Ms. Nako was unlawfully denied a *Weingarten* representative.

Since Ms. Nako was clearly an eye witness to the events of October 18, 2005, and a participant in her interview with David Bock, *Hawaii Tribune-Herald* decided to interview Ms. Nako on October 19, 2005, to ascertain her position concerning the presence of Mr. Bishop in her meeting with David Bock. On October 19, 2005, Advertising Director Alice Sledge and Business Manager Kathy Higaki met with Koryn Nako in Kathy Higaki's office. This meeting occurred at the direction of *Hawaii Tribune-Herald* counsel. (Tr. 1141). Alice Sledge interviewed Koryn Nako and wrote down her account of the events. After she completed her writing, Alice Sledge allowed Koryn Nako to review it. Nako reviewed it and made a couple of alterations. Sledge wanted Nako to make sure that it was accurate. After Nako agreed it was accurate, Sledge asked Nako to sign the statement. (Tr. 1156). Ms. Nako's witness statement makes clear that she did not ask David Bock to allow Hunter Bishop or any other witness to be present during the October 18, 2005 meeting. (GC Ex. 6). After her review, Koryn Nako voluntarily signed the witness statement. (Tr. 325). It was witnessed by Alice Sledge and Kathy Higaki. At no point during the meeting did Ms. Nako ask for a copy of the witness statement. (Tr. 1147).

The October 19, 2005 witness statement of Koryn Nako certainly qualifies as a witness statement pursuant to *Anheuser-Busch*. That case did not articulate that a witness statement be set forth in any particular manner in order to be considered a witness statement. The fact that it is in handwriting is irrelevant. What is clear is that the witness reviewed it, edited it, affirmed it and signed it voluntarily.[6]

Guild Local 39117 did, in fact, file an unfair labor practice charge claiming that Koryn Nako was unlawfully denied a *Weingarten* representative on October 18, 2005. Significantly, Guild Local 39117 withdrew this unfair labor practice charge allegation. (GC Ex. 1 (ooo) at fn. 2, internal ex. 2).

This is precisely the circumstance that *Anheuser-Busch* was designed to protect. *Hawaii Tribune-Herald* investigated the facts and circumstances surrounding an event on the very same day that Guild Local 39117 filed a grievance over the same event and subsequently filed an unfair labor practice charge; Guild Local 39117 amended its grievance on November 3, 2005 (GC Ex. 22) and demanded arbitration of that grievance on January 14, 2006 (R. Ex. 93). This statement was taken at the direction of counsel in anticipation of litigation, during the course of that Employer's investigation of employee misconduct. As the Board stated in *Anheuser-Busch*: "Requiring pre-arbitration disclosure of witness statements would not advance the grievance and arbitration process."

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[6] The record in this case is silent with respect to any discussion of confidentiality. However, that is irrelevant. While that was one of the facts present in the *Anheuser-Busch* fact pattern, that is not part of the holding. The evidence in this case reveals no evidence or allegation that *Hawaii Tribune-Herald* disclosed the witness statement to anyone before producing it in response to a subpoena at the hearing before ALJ McCarrick. The *Anheuser-Busch* exception is categorical "without regard to the particular facts of this case." *Anhueser-Busch*, 237 NLRB at 984-985.

Koryn Nako was an active union member; she was a Shop Steward from December 2004 through October 2005. (Tr. 209). Guild Local 39117 obviously knew Koryn Nako was a witness to the events. Guild Local 39117 officials certainly had access to her and could have obtained from her directly the same information she provided to *Hawaii Tribune-Herald* in her witness statement. The fact that Koryn Nako gave a witness statement was not secret, as evidenced by Guild Local 39117's specific November 2005 request for the Nako witness statement. (GC Ex. 26). Guild Local 39117 was not impeded in any way in its ability to interview Nako on its own; Nako was free to share the information she provided to Advertising Director Alice Sledge. Furthermore, the Nako witness statement was produced at the hearing before ALJ McCarrick. Guild Local 39117 had access to it for the hearing for whatever purpose was necessary.[7]

[7] In fact, at the hearing, *Hawaii Tribune-Herald* attempted to adduce evidence of what information Guild Local 39117 possessed at the time it made the November 15, 2005 information request for Nako's statement. The ALJ, upon the objection of the General Counsel, refused to permit any evidence in this regard. (Tr. 765-66, 769, 773, 775, 788, 790, 832, 847). For the purposes of this limited issue, the ALJ's ruling significantly prejudiced *Hawaii Tribune-Herald* – and by extension the Board's ability to squarely address the issues at bar. *See Northern Indiana Public Serv. Co.*, 347 NLRB 210, 213 (2006)(union not entitled to notes taken by human resources representative because "the union seeks the … notes neither to determine the basis for any action by NIPSCO against an employee nor to assess that basis against a contractual standard … the union has at its disposal, if only by virtue of Chaplain's account, the substance of what it must show to process a grievance related to workplace safety. Therefore, we find that the additional information that the union could obtain from … notes does not go to the heart of the grievance."). It is another violation of *Hawaii Tribune-Herald*'s due process rights to determine whether Guild Local 39117 was entitled to the witness statements and whether Nako's statement was a document *Hawaii Tribune-Herald* was obligated to divulge when the ALJ prohibited evidence on this critical fact. Guild Local 39117 did not need the Nako statement to determine the basis of *Hawaii Tribune-Herald*'s disciplinary action against Hunter Bishop; Guild Local 39117 filed a grievance on the issue on October 19, 2005, and issued a flyer detailing the reasons *Hawaii Tribune-Herald* suspended and ultimately discharged Bishop. (R. Ex. 65). Similarly,

It is outrageous that we are even addressing this issue. On February 1, 2001, NLRB General Counsel Leonard Page issued GC Memo 01-02, which stated in pertinent part:

> In several cases over the past few years, the Division of Advice has authorized Regions to argue that the Board should consider and overrule its Decision in *Anheuser-Busch*, 237 NLRB 982 (1978), that a party to a collective bargaining relationship has no obligation to disclose witness statements relevant to a potential grievance. *See e.g., Ormet Aluminum Mill Products Corp*, case 8-CA-29061, Advice Memorandum dated September 5, 1997. In *Fleming Cos.*, 332 NLRB No. 99 (October 31, 2000) the Board declined to overrule *Anheuser-Busch*. … Accordingly, in resolving charges and litigating pending complaints that implicate a party's obligation to disclose witness statements, the Regions should rely on extant Board law and should not rely on arguments inconsistent with *Anheuser-Busch*.

On December 6, 2005, the NLRB Division of Advice released *In re U.S. Postal Service*, 2005 WL 4076673 (Case No. 12-CA-24496). This Advice Memo explained that an employer did not violate Section 8(a)(5) of the Act by refusing to provide a union with a requested investigatory memorandum while the employer's disciplinary investigation was ongoing. In footnote 1 of that memo, the Division of Advice noted: "The Region would not attack the Employer's failure to provide any documents which qualify as witness statements under *Anheuser-Busch*, 237 NLRB 982, 984-985 (1978)." This Advice Memorandum was issued not even two months after Koryn Nako met with Alice Sledge and Kathy Higaki and ***predated*** Region 37's issuance of the initial Complaint on March 30, 2006. Based upon extant Board law at the time, Counsel for the General

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Guild Local 39117 had access to Chapel Chairman Koryn Nako to investigate what she perceived with respect to Bishop's behavior on October 18, 2005. Guild Local 39117 knew that *Hawaii Tribune-Herald* had taken a statement from Koryn Nako. (Tr. 835). Guild Local 39117's knowledge, in this regard, satisfied the teachings of *Anhueser-Busch*.

Counsel should have recognized that Koryn Nako witness statement as exempt from disclosure under *Anheuser-Busch*.

C. THE OCTOBER 19, 2005 WITNESS STATEMENT OF KORYN NAKO IS ALSO PRIVILEGED FROM DISCLOSURE UNDER THE WORK-PRODUCT DOCTRINE

Hawaii Tribune-Herald respectfully submits that the attorney work-product doctrine is an issue separate and distinct from the witness statement categorical exemption under *Anheuser-Busch*. The Board should apply the attorney work-product privilege independently where applicable.

At the top of the Koryn Nako witness statement, Alice Sledge wrote: "prepared at the advice of counsel in preparation for arbitration." Alice Sledge further testified that *Hawaii Tribune-Herald* conducted the interview at the direction of counsel. (Tr. 1141; GC Ex. 6). These facts are unrebutted in the record. In fact, Counsel for the General Counsel, in cross-examining Alice Sledge, did not challenge the fact that this document was prepared at the direction of counsel, in anticipation of litigation.

It was certainly reasonably foreseeable for *Hawaii Tribune-Herald* to anticipate that a grievance would be filed over both the suspension of Hunter Bishop and the meeting between Editor David Bock and Koryn Nako. Hunter Bishop was the Guild Local 39117 Chairperson, and *Hawaii Tribune-Herald* and Hawaii Newspaper Guild Local 39117 had already litigated six arbitration cases over misconduct involving Hunter Bishop in the prior 36 months. (R. Ex. 317, 318, 319, 320, 321, 322). It was perfectly reasonable to anticipate that Guild Local 39117 would take the same course of action. In fact, Guild Local 39117 filed a grievance protesting Mr. Bishop's suspension immediately following and on the same day as the suspension itself. (GC Ex. 20). It was

also objectively reasonable to assume that Guild Local 39117 would file an unfair labor practice charge claiming that Ms. Nako was unlawfully denied a *Weingarten* representative. As noted above, Guild Local 39117 in fact did file such a charge and later had to withdraw it due to its lack of merit. (GC Ex. 1(ooo) at fn. 2, internal exhibit 2).

The instant case is governed by *Sprint Communications d/b/a Central Tel. of Tx.*, 343 NLRB 987 (2004). That case makes clear that the witness statement here, prepared by Advertising Director Alice Sledge for the Employer's attorneys, fell within the work-product doctrine. The case holds that the prospect of litigation need not be actual or imminent; it need only be "fairly foreseeable." As stated previously, Guild Local 39117 filed a grievance on October 19, 2005 – the very same day that Hunter Bishop was indefinitely suspended. Based upon all the litigation the parties had engaged in involving Hunter Bishop, it certainly was foreseeable that Guild Local 39117 would be fighting this particular Employer action.

Under all of the circumstances, the witness statement prepared by Advertising Director Alice Sledge at the direction of counsel in anticipation of objectively, reasonably foreseeable litigation is plainly within the scope of the work-product privilege. *See also American Girl Place New York*, 355 NLRB No. 84 (August 13, 2010); *Ralphs Grocery Co.*, 352 NLRB 128, 129 (2008)(The attorney work-product privilege applies to documents prepared by a party or his representative in anticipation of litigation." (citing *Central Tel.* 343 NLRB at 990 and *BP Exploration (Alaska) Inc.*, 337 NLRB 887 (2002)); *In Re Sealed Case* 146 F.3d 881, 883-84 (D.C. Cir. 1998); *Coastal States Gas Corp. v. Department of Energy*, 617 F2d 854, 858 (D.C. Cir. 1980).

Moreover, Guild Local 39117 was not entitled to Nako's October 19, 2005 statement as it was prepared at the direction of Counsel in anticipation of litigation. (Tr. 1141, 1145). The prospect of litigation need not be actual or imminent; and need only be fairly foreseeable. *See Central Tel.* 343 NLRB at 989 (citing *Coastal States Gas Corp. v. Dpt. of Energy*, 617 F. 2nd 854, 865 (D.C. Cir. 1980)).

In *Central Tel.*, the Board found that investigation notes prepared in anticipation of litigation were not created in the ordinary course of business. *See* 343 NLRB at 989. The Board noted that a company representative immediately contacted their in-house attorney upon receiving information about the alleged serious misconduct of four union officers, which supported the company's contention that it had subjectively anticipated litigation. *Id*. The Board went on to say "furthermore the Respondent's fear of litigation was objectively reasonable. In the world of labor relations the discharge of four union officers, including the local union president, were actions taken in their capacity as union officials, would likely (albeit not inevitably) result in the union pursuing arbitration or filing an unfair labor practice charge." *Id*. at 989.

In addition, as explained in *Hertzberg v. Veneman*, 273 F.Supp.2d 67 (D.D.C. 2003), Fed.R.Civ.Pro. 26(b)(3) extends the attorney work-product privilege to:

> Materials prepared by or for ***any party or by or for its representative***; they need not be prepared by an attorney or even for an attorney. "While the 'work product' may be, and often is, that of an attorney, the concept of 'work product' is not confined to information or materials gathered or assembled by a lawyer."

273 F.Supp.2d 276 (emphasis in original) (quoting *Diversified Indus. Inc. v. Meredith*, 572 F.2d 596, 603 (8th Cir. 1977), and citing *United States v. Nobles*, 422 U.S. 225, 238-39 (1975)).

This is analogous to Hunter Bishop's situation. Bishop was a union official and employee who had a long history of disciplinary problems resulting in Guild Local 39117 pursuing six (6) grievances to arbitration; *Hawaii Tribune-Herald*'s actions were vindicated in each case. It was foreseeable that – if not inevitable – there would have been an arbitration arising from any discipline related to his conduct on October 18, 2005. Nako's statement was prepared at the advice on counsel for this likely grievance/arbitration. There was no obligation to provide it pursuant to the Guild's information request.

Additionally, the Guild could have obtained the same information without undue hardship – all it had to do was speak with Nako. *See Central Tel.* at 990. This allegation should be dismissed. The October 19, 2005, Koryn Nako witness statement is attorney work-product that Guild Local 39117 was not entitled to receive.

III. CONCLUSION

For all of the foregoing reasons, *Hawaii Tribune-Herald* respectfully requests that the Board find that the October 19, 2005 statement of Koryn Nako is in fact a witness statement protected from disclosure under the *Anheuser-Busch* precedent. Additionally, *Hawaii Tribune-Herald* respectfully requests that the Board find that the October 19, 2005 witness statement obtained by Advertising Director Alice Sledge was done at the direction of counsel and objectively and reasonably was obtained in anticipation of litigation with Hawaii Newspaper Guild Local 39117, and therefore privileged from disclosure as attorney work-product.

Dated: April 1, 2011
Nashville, Tennessee

Respectfully submitted,

/s/ L. Michael Zinser
L. Michael Zinser

/s/ Glenn E. Plosa
Glenn E. Plosa

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IV. CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 1st day of April, 2011, I served the foregoing BRIEF OF HAWAII TRIBUNE-HERALD TO ADDRESS ISSUES PRESENTED BY THE BOARD IN ITS MARCH 2, 2011 NOTICE AND INVITATION TO FILE BRIEFS, via the Board's electronic filing system and via e-mail, upon the following:

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/s/ Glenn E. Plosa
Glenn E. Plosa

Exhibit A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STEPHENS MEDIA, LLC, d/b/a
HAWAII TRIBUNE-HERALD

and

HAWAII NEWSPAPER GUILD
LOCAL 39117, COMMUNICATIONS
WORKERS OF AMERICA, AFL-CIO

Cases 37-CA-7043
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NOTICE AND INVITATION TO FILE BRIEFS

On February 14, 2011, the Board issued a Decision and Order finding, in part, that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide certain information to the Union.[1] However, the Board severed the question of whether the Respondent had a duty to provide the Union with a statement provided to it by employee Koryn Nako on October 19, 2005 or any other statements that it obtained in the course of its investigation of employee Hunter Bishop's alleged misconduct. The Board explained that

> Board precedent establishes that the duty to furnish information "does not encompass the duty to furnish witness statements themselves." *Fleming Cos.*, 332 NLRB 1086, 1087 (2000), quoting *Anheuser-Busch, Inc.*, 237 NLRB 982, 985 (1978). Compare *Northern Indiana Public Service Co.*, 347 NLRB 210 (2006) (employer notes of investigatory interviews of employees held

[1] 356 NLRB No. 63.

confidential). This case illustrates, however, that Board precedent does not clearly define the scope of the category of "witness statements." This case also illustrates that the Board's existing jurisprudence may require the parties as well as judges and the Board to perform two levels of analysis to determine whether there is a duty to provide a statement: first asking if the statement is a witness statement under *Fleming* and *Anheuser-Busch* and then, if the statement is not so classified, asking if it is nevertheless attorney work product. We have therefore decided to sever this allegation from the case and to solicit briefs on the issues it raises.

Accordingly, the parties and interested amici are invited to file briefs on the aforementioned issues.

Briefs not exceeding 25 pages in length shall be filed with the Board in Washington, D.C. on or before April 1, 2011. The parties may file responsive briefs on or before April 15, 2011, which shall not exceed 10 pages in length. No other responsive briefs will be accepted. The parties and amici shall file briefs electronically at http://mynlrb.nlrb.gov/efile. If assistance is needed in filing through http://mynlrb.nlrb.gov/efile, please contact the undersigned.

Dated, Washington, D.C., March 2, 2011.

By direction of the Board:

/s/ Lester A. Heltzer
Executive Secretary

Exhibit B

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Invitations to File Briefs

The National Labor Relations Board occasionally invites the public and all interested parties to **file** amicus briefs in cases of significance or high interest. Listed below are current and recent invitations - each with a short description of the issues involved and filing deadlines. All briefs received in response to the invitations will be posted on this page. Briefs should be filed with the Office of the Executive Secretary; contact information is provided in the text of each **invitation.**

» An archive of previous invitations and briefs can be found here.

Stephens Media, LLC d/b/a Hawaii Tribune-Herald

Click here to view this **invitation** for briefs. Seeks briefs on the questions: (1) whether the Board should continue to adhere to the holding in Anheuser-Busch, Inc., 237 **NLRB** 982 (1978), that an employer's duty to furnish information under Section 8(a)(5) of the Act does not encompass the duty to furnish witness statements and, if not, what standard should be applied to requests for such statements or any other statements that an employer obtains in the course of its investigation into alleged employee misconduct; and (2) if the statement in question is not classified as a "witness statement," whether it nevertheless is privileged from disclosure to the union as attorney work product. **The parties and interested amici are invited to file briefs with the Board in Washington, D.C. on or before April 1, 2011** addressing the issues. The parties may **file** responsive briefs on or before April 15, 2011.

Chicago Mathematics & Science Academy Charter School, Inc.
Seeks briefs on the question of whether an Illinois charter school should fall under the jurisdiction of the **NLRB** or the Illinois Educational Labor Relations Board. In this case, the Chicago Alliance of Charter Teachers and Staff sought a representation election for the school's teachers, social workers and counselors through the state board, while the School maintains the **NLRB** should conduct the election. Government entities or wholly-owned government corporations are exempt from **NLRB** coverage. The parties and interested amici are invited to **file** briefs with the Board in Washington, D.C. **on or before March 11, 2011** addressing the issue. The parties may **file** responsive briefs on or before March 25, 2011.

Specialty Healthcare
Seeks briefs on the question of what constitutes an appropriate bargaining unit in long-term care facilities. The United Steelworkers petitioned for an election of certified nursing assistants at a nursing home, while the employer argued the appropriate unit should include all non-professional employees, not just the CNAs. The Board agreed to take the case in order to revisit its 1991 decision in Park Manor Care Center, 305 **NLRB** 872 on what constitutes an appropriate unit in long-term care facilities. The **invitation** poses eight questions, including what the interested parties' experience has been under the Park Manor decision and whether its application has hindered or encouraged employee choice and collective bargaining. **The Board granted and extension of time to file briefs.** Accordingly, briefs shall be filed with the Board in Washington, D.C. on or before **March 8, 2011**. The parties may **file** responsive briefs on or before **March 22, 2011**. Click here to view datasets related to this case requested through FOIA.

Roundy's Inc.
Click here to view briefs filed in this case:
In cases alleging unlawful employer discrimination in nonemployee access, should the Board continue to apply the standard articulated in Sandusky Mall Co. (329 **NLRB** 618, 623), and if not, what standard should the Board adopt to define discrimination in this context? Also, what bearing, if any, does Register Guard (351 **NLRB** 1110) have on the Board's standard for finding unlawful discrimination in nonemployee access cases? An extension of time to **file** briefs was granted, and the deadline to **file** was January 7, 2011.

Lamons Gasket Co.

Seeks review of the Board's 2007 decision in *Dana Corp.* (351 **NLRB** 434), which found that employees and other unions should have a 45-day period in which to **file** for an election following an employer's voluntary recognition of a union. Briefs must be received by November 1, 2010, and all parties should be served with the brief. **The deadline to file briefs has passed.**

Note: On September 17, the employer in *Rite Aid Store #6473*, which is cited as the lead case in the Notice and **Invitation** to **File** Briefs, withdrew its request for review. Therefore, briefs should not be filed under RiteAid, but instead under Lamons Gasket Co. This change does not affect the scope of the review.

UGL-Unicco Service Co and Grocery Haulers, Inc.

Seeks review of the Board's 2002 decision inMV Transportation(337 **NLRB** 770), on the duties of a successor employer toward an incumbent union. **The deadline to file briefs has passed.**

Exhibit C

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March 21, 2011
(Via Electronic Filing and U.S. Mail)

Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 14th St. NW, Ste. 11600
Washington D.C. 20005-3419

RE: STEPHENS MEDIA, LLC D/B/A *HAWAII TRIBUNE-HERALD*; NLRB CASE NOS. 37-CA-7043 ET AL; NOTICE AND INVITATION TO FILE BRIEFS

Dear Secretary Heltzer:

When I received my fax copy of the Notice and Invitation to File Briefs on March 2, 2011, it communicated to me there were two issues in which the Board was interested:

1. Whether the witness statement obtained in the *Hawaii Tribune-Herald* case in fact is a witness statement under the *Fleming* and *Anheuser-Busch* cases.

2. If the statement is not classified as a witness statement, is it nevertheless attorney work product?

When one goes to the NLRB's website, your announcement of the invitation contains an issue not present in the invitation itself:

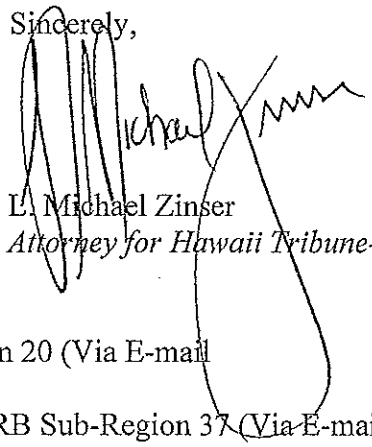
> Whether the Board should continue to adhere to the holding *Anheuser-Busch, Inc.* 237 NLRB 982 (1978), that an employer's duty to furnish information under Section 8(a)(5) of the Act does not encompass the duty to furnish witness statements.

If I had not viewed the website, I would not have been aware that that was an issue. There may be other interested parties who have not seen the website announcement. There seems to be some confusion. Is the issue articulated on the website an error?

On behalf of *Hawaii Tribune-Herald*, we are asking the National Labor Relations Board to clarify the issues on which it seeks briefs and to reissue the invitation with extended time limits, in order to more fairly allow interested parties to brief the issues the Board desires to be briefed. We request that the April 1, 2011 date be extended to April 15 and that the parties' reply date be extended to April 29, 2011.

Thank you for your consideration of this request.

Sincerely,



L. Michael Zinser
Attorney for Hawaii Tribune-Herald

LMZ/ss

cc: Joe Frankl, Regional Director, NLRB Region 20 (Via E-mail joseph.frankl@nlrb.gov and U.S. Mail)
Thomas W. Cestare, Officer-in-Charge, NLRB Sub-Region 37 (Via E-mail thomas.cestare@nlrb.gov and U.S. Mail)
Meredith Burns, Esq. (Via E-mail meredith.burns@nlrb.gov and U.S. Mail)
Lowell K.Y. Chun-Hoon (Via Facsimile 808.521.8046 and U.S. Mail)

Exhibit D

United States Government
NATIONAL LABOR RELATIONS BOARD
Office of the Executive Secretary
1099 14th Street NW, Suite 11600
Washington, DC 20570

Telephone: 202/273-1067
Fax: 202/273-4270
www.nlrb.gov

March 24, 2011

Re: Stephens Media, LLC d/b/a
Hawaii Tribune-Herald
Cases 37-CA-7043, et al.

L. Michael Zinser, Esq.
The Zinser Law Firm
414 Union Street, Suite 1200
Bank of America Plaza
Nashville, TN 37219

[Via Facsimile and Regular Mail]

Dear Mr. Zinser:

This will acknowledge receipt by electronic filing and regular mail of your letter dated March 21, 2011. Your letter states that the NLRB website's announcement of the Board's March 2, 2011 Notice and Invitation to File Briefs in this case presents an issue for briefing that is not present in the Notice and Invitation itself. Accordingly, your letter requests a 14-day extension to April 15, 2011 to file briefs in response to the Notice and Invitation.

The announcement on the Agency's website to which you refer was inaccurate, and has been revised to precisely reflect the issues on which the Board seeks briefs, as set forth in the March 2, 2011 Notice and Invitation. Thus, any confusion that may have been caused by the announcement on the website has been eliminated. The Notice and Invitation, which is the operative document for the issues to be addressed, has not been changed and fully provides:

> Board precedent establishes that the duty to furnish information "does not encompass the duty to furnish witness statements themselves." *Fleming Cos.*, 332 NLRB 1086, 1087 (2000), quoting *Anheuser-Busch, Inc.*, 237 NLRB 982, 985 (1978). Compare *Northern Indiana Public Service Co.*, 347 NLRB 210 (2006) (employer notes of investigatory interviews of employees held confidential). This case illustrates, however, that Board precedent does not clearly

define the scope of the category of "witness statements." This case also illustrates that the Board's existing jurisprudence may require the parties as well as judges and the Board to perform two levels of analysis to determine whether there is a duty to provide a statement: first asking if the statement is a witness statement under *Fleming* and *Anheuser-Busch* and then, if the statement is not so classified, asking if it is nevertheless attorney work product. We have therefore decided to sever this allegation from the case and to solicit briefs on the issues it raises.

Accordingly, the parties and interested amici are invited to file briefs on the aforementioned issues.

Accordingly, your request for an extension of time is denied. The due date for the receipt of briefs in Washington, D.C. remains April 1, 2011.

By direction of the Board:

Lester A. Heltzer
Executive Secretary

cc: Parties